In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 473

JOHN H. BINGLER, DISTRICT DIRECTOR OF INTERNAL REVENUE, PETITIONER

v.

RICHARD E. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In their brief in opposition, respondents neither deny that the decision below is in conflict with the decisions of several other circuits nor challenge the administrative need to resolve the resulting uncertainty in the application of the scholarship and fellowship exclusion of Section 117 of the Internal Revenue Code. Instead, asserting "conformity" between the decision below and *Wells* v. *Commissioner*, 40 T.C. 40, they insist that the conflict may be resolved through implementation of the Commissioner's stated intention [1] to amend the Treasury Regulations to conform with *Wells* and similar cases.

[1] See Rev. Rul. 65–59, 1965–1 Cum. Bull. 66.

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Wells, however, involved a problem remote from this case. The issue was the taxability of amounts received by a New York University graduate student who, in fulfilling requirements for a Ph.D. degree, participated in a Veterans Administration training program. The student was not a VA employee prior to the training and was not obligated to undertake future employment with it. The Tax Court found as a fact that the primary purpose of the training program was to train students to be clinical psychologists with nothing more than the hope that they might work for the Veterans Administration upon graduating, and any services that the student rendered during the training period were not of substantial value to the Veterans Administration. Such services were (40 T.C. at 48) "under close supervision by staff psychologists" who "could have accomplished the same tasks in little more time than they spent supervising and counseling" the students. Here, in contrast, only Westinghouse employees were eligible for the Bettis program; participation was subject to Westinghouse and AEC approval; the selection of these topics was closely supervised; and respondents and all other participants were obligated to return to work at the Bettis Laboratory of Westinghouse.

The Internal Revenue Service announced some time ago that it was considering amending the Regulations under Section 117 so as to conform the Regulations to the results reached in *Wells* and similar cases. But any such amendment obviously would not cover the situation here or in the cases in the Fourth, Fifth, Sixth, and Tenth Circuits and Court of Claims that have reached results in conflict with the decision below. It has been and continues to be the position of the Internal Revenue Service that amounts paid by an employer to an employee on educational leave with

a commitment thereafter to render services to the employer are not excludable fellowships or scholarships. Neither the Internal Revenue Service's treatment of *Wells* nor the proposed Regulations are inconsistent with this approach.[2] This is evidenced by the position of the Service in the present case. The Internal Revenue Service has expressly advised us that no change in this position, by regulation or otherwise, is contemplated.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1968.

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[2] The acquiescence of the Internal Revenue Service in *Evans* v. *Commissioner*, 34 T.C. 720, see 1965–1 Cum. Bull. 4, where the taxpayer was obligated to work for her grantor upon completing her studies or to refund the sums advanced, may be inconsistent with the position above. Compare the decision here (Appendix to the petition, p. 14a & n. 5) with *Stewart* v. *United States*, 363 F. 2d 355, 357 (C.A. 6). Although *Evans* may be distinguished in that the recipient was not and had never been employed by the grantor when she received her stipend, the Internal Revenue Service has advised the Assistant Attorney General in charge of the Tax Division that because the Service is of the view that a grant conditioned on future employment is not a fellowship or scholarship, the *Evans* acquiescence will be modified.

[3] Respondent's argument that the petition should be denied because the judgment of the court of appeals is not a final decision is not well taken. The court of appeals has acted finally on the appeal before it and directed that there be further proceedings in conformity with a changed rule of law. This Court has commonly granted certiorari in such circumstances inasmuch as the ruling "is fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; see, also, *Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 408; *Donruss Co.* v. *United States*, 384 F. 2d 292 (C.A. 6), certiorari granted, 390 U.S. 1023.

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